COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

v. **CASE NO. PUE990619**

ROBERT A. WINNEY

d/b/a THE WATERWORKS COMPANY OF FRANKLIN COUNTY,
Defendant

REPORT OF MICHAEL D. THOMAS, HEARING EXAMINER

March 3, 2000

On October 22, 1999, the Commission entered a Rule to Show Cause (the "Rule") against Robert A. Winney, d/b/a The Waterworks Company of Franklin County (the "Defendant"). The Division of Energy Regulation (the "Staff") alleged in the Rule that:

1. The Defendant violated § 56-265.13:4 of the Code of Virginia by failing to furnish reasonably adequate facilities. The Defendant failed to repair leaks in a water storage tank and in a distribution line for approximately six weeks and leakage from the line caused damage to a customer's property, resulted in substantial water loss, and compromised the reliability of the system. As the holder of a certificate of public convenience and necessity issued pursuant to § 56-265.3 of the Code of Virginia, the Defendant is obligated to render adequate service to the public. The Defendant's facilities are not adequately maintained as required by law.

2. The Defendant violated § 56-265.13:4 of the Code of Virginia by failing to furnish reasonably adequate service. The Defendant's service was interrupted for several hours on the afternoon of September 5, 1999, and on the morning of September 12, 1999. On September 13, 1999, service to at least one customer was interrupted for several hours. As the holder of a certificate of public convenience and necessity issued pursuant to § 56-265.3 of the Code of Virginia, the Defendant is obligated to render adequate service to the public. The Defendant's service is inadequate as required by law.

3. The Defendant violated § 56-265.13:4 of the Code of Virginia by failing to furnish reasonably adequate service. The Defendant stated in letters to the Staff that he would not pay the electric bills required to operate the water company's well pumps. If not paid, water service to the Defendant's customers would be interrupted. On behalf of Defendant's customers, the Staff negotiated with the electric utility serving Defendant to continue electric service temporarily. As the holder of a certificate of public convenience and necessity issued pursuant to § 56-265.3 of the Code of Virginia, the Defendant is obligated

to render adequate service to the public. The Defendant jeopardized service by failing to provide for payment of his electric bills.

4. The Defendant violated § 56-265.13:6 of the Code of Virginia by charging a higher rate than the one authorized by the Commission and by refusing to make refunds. The Defendant rendered water bills for the third quarter of 1999 payable on or before July 10, 1999, using a rate of $80.50. In *Application of Robert A. Winney d/b/a The Waterworks Company of Franklin County*, Case No. PUE980811, Final Order dated April 15, 1999, the Commission dismissed his application to increase the quarterly rate from $67.50 to $80.50. The Commission also prescribed a rate for the third quarter of 1999 of $41.50 or $40.74, depending on the customer's payment history for the first two quarters of 1999. The rates were developed by subtracting a refund due the company's customers from $67.50, the authorized quarterly rate. The company's customers were denied the refund directed by the Commission because the Defendant billed at a rate higher than that prescribed by the Commission.

5. The Defendant violated § 56-265.13:5 of the Code of Virginia and Rules 4 and 5 of the Commission's Rules Implementing the Small Water or Sewer Public Utility Act, 20 VAC 5-200-40, by billing his customers $80.50 for the third quarter of 1999. The Defendant implemented a change in rates and charges. In the same Final Order cited in paragraph 4 above, the Commission dismissed Defendant's application to change rates and directed Defendant to continue charging his $67.50 per quarter rate. The statute and the Rules require Defendant to give written notice to the Commission and to his customers before initiating an increase in rates. The Defendant failed to give the required notice and therefore the rate increase for the third quarter of 1999 was unlawful.

The Rule ordered Defendant to appear before the Commission on November 30, 1999, in the General District Court, Franklin County Courthouse, Rocky Mount, Virginia, and show cause why the Commission should not:

(a) impose a fine for failing or refusing to obey a Commission order, as provided by § 12.1-33 of the Code of Virginia;

(b) punish for contempt of a Commission order by fine or by confinement, as provided by § 12.1-34 of the Code of Virginia; and/or

(c) impose a penalty or suspend or revoke the certificate of public convenience and necessity issued to Defendant, as provided by § 56-265.6 of the Code of Virginia.

The Rule further ordered Defendant to file an Answer, as provided by Rule 5:16(c) of the Commission's Rules of Practice and Procedure, on or before November 12, 1999. In his Answer, Defendant was required to admit or deny any or all of the allegations set forth above and to state whether he intended to appear at the hearing. If the Defendant denied any allegation in the Rule, he was required to state those facts that refute the allegation.

On October 29, 1999, the Staff filed a Motion for Consideration of Additional Allegation. In its Motion, the Staff argued that evidence of an additional alleged violation of the Code of Virginia by Defendant was provided to the Staff after the Commission entered the Rule in this case. Specifically, the Staff alleged:

> 6. The Defendant violated § 56-265.13:6 of the Code of Virginia by failing to make certain refunds as ordered by the Commission. In *Application of Robert A. Winney d/b/a The Waterworks Company of Franklin County*, Case No. PUE990613, Dismissal Order of September 27, 1999, the Commission dismissed the company's application to change its rates and charges pursuant to the Small Water or Sewer Public Utility Act. In its Dismissal Order, the Commission noted that some of Defendant's customers might have paid the proposed rate of $80.50 per quarter for water service. The Commission ordered the Defendant to make refunds and file a report of the refunds with the Clerk of the Commission.

By Hearing Examiner's Ruling entered on November 1, 1999, the Rule was amended to include the additional allegation set forth in the Staff's Motion for Consideration of Additional Allegation.

On November 10, 1999, a letter authored by Defendant and entitled "Pony Show and Reimbursement of fees" was filed with the Clerk of the Commission.[1] In this letter, Defendant expressed his extreme displeasure with a meeting he had on October 5, 1999, with members of the Commission's Staff. Defendant stated he was unable to make any refunds because he had only $3.76 in his checking account and $3,500.00 in bills. He placed his money woes directly on the Commission for not allowing the rate increases he requested. Defendant further stated he advised the Commission, the Staff, and Mr. Wayne Smith, the Staff's counsel of his inability to make the refunds ordered by the Commission. Finally, Defendant accused this Hearing Examiner of making unsubstantiated accusations concerning Defendant, and blamed the Hearing Examiner for not pursuing Defendant's allegations that a certain witness had lied in court.[2]

On November 22, 1999, Defendant filed a letter with the Clerk of the Commission requesting that the hearing scheduled for November 30, 1999, be postponed until January 2000. The Defendant gave three reasons in support of his request. First, he did not receive the Rule until November 10, 1999, and his legal advisor was in court all week and he was unable to get an appointment until the following week.[3] Second, his attorney's caseload could not be altered to accommodate the short notice of a hearing. Finally, the Defendant, his witnesses, and his attorney had made plans to be out of town during the Thanksgiving holiday and into the month of December.

On November 22, 1999, the Staff filed a Response to Request for Continuance. In its Response, the Staff argued the Rule entered in this proceeding raised serious issues concerning the

[1] The letter was dated October 9, 1999, and was sent to Commonwealth of Virginia, SCC, P.O. Box 1197, Richmond, Virginia but was not received by the Commission Clerk's Office until November 10, 1999.
[2] For the record, the person the Defendant accuses of lying in court did not appear as a witness in either of the two previous cases involving the Defendant that were heard by this Hearing Examiner.
[3] The proof of notice indicates that the Sheriff of Franklin County served a copy of the Rule on the Defendant on November 4, 1999.

provision of water service to customers and the proper billing for such service. The Staff further argued the public interest would not permit this matter to be continued until January 2000. The Staff stated it was not opposed to a two-week continuance, and it requested that any ruling granting a continuance should include a directive that counsel for Defendant file a notice of appearance.

By Hearing Examiner's Ruling entered on November 23, 1999, the hearing on the Rule was continued to December 14, 1999, and Defendant's counsel was directed to file a notice of appearance.

On November 29, 1999, Defendant's Answer was filed with the Clerk of the Commission. Defendant stated the Staff's first allegation that he had a leak in the storage tank serving the Lakemount subdivision was a lie. Defendant admitted that he had a minor leak in one of the service lines, but he stated he reported this leak to the Staff and advised the Staff that he did not have any funds to repair the leak. He further stated the leak did not compromise the system. Defendant reiterated his position that the Commission is hampering his ability to provide better service by continually denying his requests for a rate increase.

In response to the second allegation, Defendant stated he received only one phone call informing him there was no water on September 5, 1999, and he immediately went out to the water system and turned on the pumps. Defendant stated the water system's pumps are on a timer and after he turned them on the water in the tank was replenished. Defendant further stated that on Saturday, September 12, 1999, he checked and there were approximately 10,500 gallons in the tank. On Sunday, September 13, 1999, another water outage was reported and Defendant again went and turned the pumps on. Defendant stated he tried to have 24,000 gallons of water delivered on that Sunday, but the water hauling company could not deliver the water until Monday morning.

In response to the third allegation, Defendant draws a distinction between the language in the allegation that he "would not" pay his electric bill with his correspondence with the Staff that he "could not" pay his electric bill because the Commission had not given him sufficient funds to meet his expenses. Defendant stated he continually advised the Commission's Staff of his inability to pay his electric bills. Defendant disputes the Staff's claim that it negotiated with American Electric Power Company ("AEP") regarding continued electric service to the water system. Defendant stated he was able to pay his electric bill in October when his customers paid their fourth quarter water bills. Defendant further stated the allegations in the Rule were based on lies and innuendo designed to improve the Commission's position in this case. Defendant believes that he would not be in the financial position he is in today if the Commission had listened to its Staff and agreed that his rate request was fair and reasonable.

In response to the fourth allegation, Defendant stated the Commission was mistaken that he improperly issued his third quarter bills using an incorrect rate. Defendant stated he appealed the Commission's decision and he thought as long as the appeal was pending he could continue to use the higher $80.50 rate. Defendant stated he notified his customers of the appeal and the continued use of the higher rate. Defendant further stated that most of his customers did not pay the higher rate because of correspondence received from the Staff's counsel. Any customer that paid the higher rate for the third quarter would have been credited with an overpayment on their fourth quarter bill. Finally, Defendant stated that the allegation that he refused to make refunds is a lie.

He again drew a distinction between refusing to make the refunds and the inability to make the refunds.

In response to the fifth allegation, Defendant stated the Commission was caught in another lie. Defendant stated that he did send notices to all his customers of the proposed rate increase. Defendant stated that a letter sent to the Commission by Mrs. Clingenpeel included a copy of his notice to increase rates and this proves that he sent the notice to all of his customers. As a footnote, Defendant stated that, as of November 14, 1999, he was no longer the owner of the water company. He further stated that he does not have any stock or holding in the company. Defendant signed his Answer, "R. Winney (a former owner of the water company)."

On November 26, 1999, Defendant sent a letter to counsel for the Staff with a preliminary list of individuals that might be called as witnesses at the hearing. The Defendant indicated that his attorney would contact counsel for the Staff and request the appearance of these witnesses and the production of certain documents in the Commission's files. He requested that counsel for the Staff assemble the documents and await a call from his attorney. When he signed the letter, Defendant represented that he was the former owner of the water company and that it was sold on November 14, 1999.

On December 2, 1999, Defendant sent a letter to the Clerk's Office stating that he had been unsuccessful in retaining an attorney. Defendant further stated he would not appear before the Commission unless he was represented by counsel.[4] Defendant further stated that counsel for the Staff would be called as one of his witnesses and therefore, he would have to recuse himself from the proceeding. When he signed the letter, Defendant again represented that he was the former owner of the water company.

By Hearing Examiner's Ruling entered on December 8, 1999, the Rule to Show Cause hearing was rescheduled from December 14, 1999 to January 11, 2000. The Hearing Examiner found that due process considerations supported a continuance in order for Defendant to retain counsel and for his counsel to prepare for the hearing. The Defendant was advised that no further continuances would be granted, unless for extraordinary cause shown.

On December 27, 1999, Defendant sent a letter to the Hearing Examiner requesting that the Examiner intercede in the case. Defendant requested that the Examiner make a decision based on the documents that had been filed in the case. By letter dated January 4, 2000, the Examiner advised Defendant that he did not have authority to settle a case on behalf of the Commission's Staff, nor to otherwise terminate a proceeding commenced by a Rule to Show Cause. The Defendant was advised that, absent a settlement agreement, the Rule to Show Cause hearing would be held as scheduled on January 11, 2000.

By letter dated January 3, 2000, Defendant advised the Hearing Examiner that he still had been unable to retain an attorney. Defendant stated that he did not have the money to hire an attorney. He further stated that he had advised the Staff he had used all his money to pay bills and did not have any money to make refunds. Defendant included copies of letters in which he advised

[4] Until this date, Defendant represented in correspondence to the Commission that he was represented by an attorney.

the Staff of his inability to make refunds and of his purchase of water for his water company. Defendant further stated that he had no ties to the water company and that he did not want to be involved with any type of water company in the future.

By letter dated January 5, 2000, Defendant forwarded a copy of an article published in the Franklin News-Post concerning his water company. The Defendant claims the Commission ruined his family's reputation in the newspaper article. As a result, he claims he lost his water business. He stated he offered to settle this matter, but he had not heard a response from anyone at the Commission. He reiterated that he did not have sufficient funds to retain an attorney. He further stated that he would appear at the hearing and request that the Commission appoint an attorney for him.

The Rule to Show Cause hearing was convened January 11, 2000. The Staff appeared by its counsel Wayne N. Smith, Esquire. The Defendant appeared *pro se*. A transcript of the hearing will be filed with this Report.

At the beginning of the hearing, the Defendant inquired on the status of certain documents he requested from the Commission that he considered vital to his defense. Upon questioning from the bench, it was ascertained that the documents requested by the Defendant were documents that he had supplied to the Commission. The Defendant confirmed that he had copies of the documents in his files. The purpose for Defendant's request was to confirm that the documents were in fact filed with the Commission, particularly Defendant's appeal in Case No. PUE980811.[5] The Defendant was advised of the procedures for requesting documents from the Commission. The Hearing Examiner declined to continue the case because of Defendant's failure to follow the Commission's discovery rules and obtain the documents he needed for his defense. The Defendant further requested the appointment of counsel and that request was also denied. (Tr. at 6-11).

SUMMARY OF THE RECORD

The first witness was John A. Stevens, a Staff utilities engineer. Mr. Stevens' testimony covered the Defendant's water service problems and Defendant's failure to obey Commission orders. Mr. Stevens testified he inspected the Defendant's water system on October 5, 1999. The inspection was prompted by complaints from Defendant's customers received in late August 1999, that there had been a substantial leak in the system between 1049 and 1054 Lakemount Drive. The customers reported the leak to the Defendant five weeks earlier, and followed up several times during the intervening period by phone and written correspondence. By late August 1999, Defendant still had not effected a repair. The leak reportedly was causing water to percolate up through the asphalt driveway of one of the residences. (Ex. JS-1; Tr. at 19-21).

[5] Counsel for the Staff advised the bench in his opening statement that correspondence from the Defendant was often addressed to various Commission employees at various times over the last three years. As a courtesy, Defendant's correspondence was filed in any case Defendant had pending before the Commission to avoid any possible prejudice to the Defendant. Counsel for the Staff further advised the bench that he relied on Defendant's several representations that he was represented by counsel, and was awaiting a call from Defendant's counsel, to work out the particulars of any document production. (Tr. at 14-16).

Mr. Stevens further testified that he received several customer complaints concerning water outages that occurred from September 5 through September 13, 1999. The customers and the Staff reported the outages to Defendant. The Defendant advised one of his customers that the outages were due to leaks and that he had no money to repair the leaks. (Ex. JS-2, JS-3 and JS-4).

Mr. Stevens testified that the Defendant's customers repaired the leak in the distribution line on September 17, 1999. At that time, the pipe had been leaking for approximately seven weeks. (Tr. at 29-30).

Mr. Stevens also testified that he received a letter from Defendant dated September 4, 1999. The letter advised the Staff that he had no money to pay his electric bill, and that AEP would terminate his electric service on or about September 14, 1999. Mr. Stevens contacted the electric company to advise it that approximately 50 homes would be without water service, if it terminated electric service to Defendant. At Mr. Stevens' request, the electric company agreed to postpone the termination while the Staff worked to resolve the problem with the Defendant. This was not the first time that Mr. Stevens had to intercede on Defendant's behalf with AEP over the nonpayment of electric bills. (Ex. JS-5; Tr. at 26-28).

Mr. Stevens' testimony also covered Defendant's failure to comply with Commission orders. He testified the Defendant filed an application for a rate increase on November 16, 1998. This case was assigned Case No. PUE980811. The Defendant requested a rate increase from $67.50 to $80.50 per quarter for unmetered water service to be effective January 1, 1999. The Commission permitted the rates to be placed in effect on an interim basis, subject to refund, and scheduled a hearing on the application. Under the interim rates, Defendant was permitted to charge his customers $80.50 for the first and second quarters of 1999. On April 15, 1999, the Commission entered its Final Order in Case No. PUE980811 wherein the Commission denied the requested rate increase. In its order, the Commission directed the Defendant to refund the overcharges collected during the period interim rates were in effect. Specifically, the Commission allowed Defendant to effect the refund to his customers in the form of a bill credit. Further, the Commission ordered the Defendant to charge his customers the sum of $41.50 or $40.74 for the third quarter of 1999. For the fourth quarter of 1999, Defendant's authorized water rate would return to $67.50 per quarter. The Defendant did not appeal the Commission's Final Order in Case No. PUE980811. (Tr. at 31-35).

Mr. Stevens sponsored two exhibits that show Defendant billed his customers $80.50 for the third quarter of 1999. In the third quarter water bills, Defendant states that he sent an appeal to the Commission and, unless otherwise notified by the Commission, he would continue to charge $80.50 per quarter for water service. The Defendant sent these bills to his customers on or about June 30, 1999. (Ex. JS-6 and JS-7; Tr. at 35-37).

Mr. Stevens testified the Defendant filed another application for a rate increase on or about August 20, 1999. This case was assigned Case No. PUE990613. The Defendant requested to increase his water rates from $67.50 to $80.50 for the fourth quarter of 1999. It appeared to the Staff that the Defendant continued to bill the $80.50 water rate for the third quarter of 1999, and it was only after the Staff repeatedly advised the Defendant that he could not charge this rate that he filed for another rate increase. The Commission dismissed Defendant's application for a rate increase,

and directed Defendant to refund any monies collected above the authorized rate of $67.50. The Staff introduced into evidence one complaint dated October 20, 1999, that Defendant failed to make the refund as ordered by the Commission. (Ex. JS-9; Tr. at 38-41).

The Defendant cross-examined Mr. Stevens. Mr. Stevens testified that Defendant notified the Staff of the leak in his water system, that he was not going to repair the leak because he did not have any money, and that he could not afford to pay anyone else to repair the leak. Mr. Stevens testified that he did not see a leak at the storage tank during his inspection; however, he noticed another leak coming from a customer's meter box. The customer indicated to Mr. Stevens that he had reported the leak to the Defendant. Mr. Stevens testified two engineers from the Virginia Department of Health, who were conducting the inspection with him, bailed the water out of the meter box. They discovered that the leak was on the customer's side of the box. Since the leak was on the customer's side of the box, it was the customer's responsibility to repair. Mr. Stevens testified he felt it was the Defendant's responsibility to come out and inspect the leak and notify the customer that it was his responsibility to make the repair. (Tr. 50-54).

Mr. Stevens further testified on cross-examination that the Defendant never called him to explain that he was having difficulty paying his electric bills. Although Mr. Stevens was aware the delinquent electric bill had been paid, he expressed the Staff's concern that they did not know how long AEP would have provided service, and how the electric bill would ultimately be paid. Mr. Stevens related a similar problem with nonpayment of electric bills by Defendant that occurred a year earlier. In Mr. Stevens' opinion, the Defendant will push the Staff as far as he can to avoid paying his electric bill. When the Defendant thinks he can push no farther, he will pay the bill. (Tr. at 60-61).

When questioned further by Defendant, Mr. Stevens raised another of Staff's concerns with Defendant's operation of the water system. The Staff could not understand why the Defendant was not repairing the leaks himself. In his last rate case, Defendant included a $6,000.00 per year salary for himself. Other than sending out the quarterly bills, the Staff could not understand what the Defendant did to earn this salary. It is Staff's position that Defendant himself should have repaired the leak in the distribution line. (Tr. at 64-65).

Finally, in response to questions from the bench, Mr. Stevens testified the Defendant had supplied the Staff with no evidence that the water system had been sold. Additionally, he testified he did not know the identity of "Jay R." The name "Jay R" appears on various correspondence filed with the Commission and is identified as a principle in The Waterworks Company of Franklin County. The Defendant represented that "Jay R" is the majority owner of the water system.[6] (Tr. at 80-81).

[6] At the close of the hearing, the Defendant revealed the identity of the mysterious "Jay R." Defendant's son is named Jonathan Robert Winney, or "Jay R" for short. The Defendant claims he borrowed the funds to purchase the water system out of bankruptcy from his son's college fund, and he has an agreement with his son to repay the funds. Defendant claims that he entered into a nondisclosure agreement with his ten-year old son that his son's name would not be publicly disclosed. (Tr. at 168). This raises a serious concern over who really owns this water system. At various times in this proceeding, Defendant has claimed he owns the water system, that he does not own the system, that he sold the system to someone else, or now that his son is the majority owner of the system. If his son is the majority owner of the water system, then who is the minority owner?

The next witness to testify for the Staff was Robert R. Deitrich, a field inspector with the Virginia Department of Health, Office of Water Programs ("VDH"). Mr. Deitrich summarized VDH's concerns with Defendant's water system. VDH is concerned with Defendant's inability to keep up with routine maintenance, emergencies, water outages, and water leaks. VDH has also received complaints from Defendant's customers concerning these problems. VDH is also concerned about expansion of the system. Several new homes have been constructed in the subdivision and the system does not have the capacity to adequately serve those homes, although the system has not reached its permitted capacity. Mr. Deitrich observed the water system's storage tank to be at or near empty a number of times during the summer of 1999, and he attributed this to the leak in the main distribution line. He inspected the leak in the line and estimated the water flow to be approximately four gallons per minute. In his opinion, the leak was of sufficient magnitude to jeopardize the system because the system was losing about 5700 gallons of water per day. The leak almost doubled the demand on the system for an eight-week period. Mr. Deitrich also testified VDH has not been receiving operations reports from the Defendant, such as number of homes served and average usage per day. Defendant finally reported in November 1999, that he had 56 connections and used between 5500 and 6000 gallons of water per day. VDH has had difficulty obtaining valid water samples from Defendant for bacteriological testing. With the number of leaks experienced by Defendant's water system, VHD is concerned that bacteriological contamination may become an issue. At present, the Defendant has not provided VDH with the information it needs to adequately monitor Defendant's water system. (Tr. at 84-95, 105-06).

On cross-examination by Defendant, Mr. Deitrich explained in greater detail the difficulty VDH has had with Defendant submitting water samples for testing. Although Defendant submitted his annual water samples timely and they tested within state guidelines for metals, a majority of Defendant's monthly water samples submitted for coliform bacteriological testing during 1999 have been invalid because they contain a turbid culture.[7] For the last three months, VDH has not had a water sample that tested negative; all of the samples have been turbid. Mr. Deitrich explained that Defendant's testing procedures are partially to blame for the high number of invalid samples. Apparently, the Defendant waits until the end of the month to collect his samples. By the time the samples reach the lab and are rejected, the Defendant has insufficient time to resubmit samples for that month. Mr. Deitrich would not go on record and say that the water from Defendant's system is free from contamination. He did feel that the annual samples accurately reflected the organics and other metals found in the water. Mr. Deitrich testified the problem of possible contamination of Defendant's system would be a simple matter to cure. All the Defendant would have to do is put some chlorine in the system's storage tank and let it work its way through the system. Mr. Deitrich recommended disinfecting the system one time and then closely monitoring the water samples for the presence of bacteria. (Tr. at 102-03, 111-118).

The first public witness to testify was Robert E. Gillespie. Mr. Gillespie resides in the Overlook subdivision, which is served by the Defendant's water system. Mr. Gillespie moved into his home in March 1997. Several months after he moved in, he noticed sediment clogging the aerator screens on his plumbing fixtures. Mr. Gillespie lives at the end of the water systems supply line. He sent a letter on January 5, 1998, to Defendant requesting that the main water supply line be flushed. He followed up this initial correspondence with letters on January 21, 1998; November 18,

[7] A turbid culture indicates the presence of a bacteria other than fecal coliform in the water.

1998; January 8, 1999; and October 4, 1999. To date, the Defendant has taken no action to flush the line. To flush the line, Defendant would only have to open a valve and allow the water to run for a short period of time. (Tr. at 120-21).

Mr. Gillespie also reported two water leaks to Defendant where the Defendant failed to respond. The first leak occurred around his water connection box on June 15, 1999, and was reported to the Defendant. The Defendant responded to Mr. Gillespie that he would be out the next day, but he never showed up. Six days after he reported the leak, Mr. Gillespie had a contractor who was installing an irrigation system for him repair the leak. On October 1, 1999, Mr. Gillespie had another leak around his water connection box. He promptly reported the leak to the Defendant. After he received no response, Mr. Gillespie sent the Defendant a letter on October 4, 1999, explaining the problem. Mr. Gillespie never received a response from the Defendant. On October 5, 1999, two engineers with the VDH, accompanied by Mr. Stevens, bailed the water out of the water connection box and determined that the leak was on Mr. Gillespie's side of the box and was therefore his responsibility to repair. Mr. Gillespie purchased a 75-cent clamp and made the repair himself that day. (Tr. at 122-23).

The second public witness was Mr. William C. Eisaman. Mr. Eisaman's testimony covered Defendant's failure to make refunds. Mr. Eisaman testified the Defendant owes him in the aggregate $235.51 in refunds for 1997, 1998 and 1999. The Commission's authorized rate has been $270.00 per year. Yet in 1997, Mr. Eisaman paid $400.49 for water; in 1998, he paid $323.02 for water; and in 1999, he paid $322.00 for water. Mr. Eisaman has received no refunds from the Defendant. Mr. Eisaman testified that he received a bill in the amount of $82.50 for the first quarter of 2000. On the bill, the Defendant indicated that the water company was under new ownership as of November 14, 1999. Mr. Eisaman opined that the present ownership cannot operate the company properly. He recommended the Commission either revoke the company's certificate of authority, or appoint someone to run the company until it can be sold to a responsible operator. (Tr. at 125-130).

The third public witness to testify was Mr. Scott McCulley. Mr. McCulley testified he was one of the homeowners that repaired the company's leaking distribution line on September 17, 1999. He testified it took from 9:30 a.m. to 1:00 p.m. to make the repair. Mr. McCulley has appeared at several of Defendant's rate cases and he cannot understand how the Defendant can claim that he works 10 hours per week for the water company. At best, Mr. McCulley believes the Defendant is only working a couple hours a month, and that's simply to cash some checks and pay a few bills. Mr. McCulley testified the Defendant is not paying the company's bills on time, he is not collecting water samples as he is required, he has not flushed the system as he was requested to do, and he does not respond to emergencies. Mr. McCulley hopes the Commission would force the Defendant to provide proper water service. (Tr. at 135-141).

The next public witness to testify was David W. Talbot. Mr. Talbot's testimony addressed the leak in the company's distribution line. Mr. Talbot became aware of the leak during the fourth week of July 1999, when he noticed water bubbling from the ground along his neighbor's driveway. He immediately notified the Defendant of the leak. After five weeks with no response from the Defendant, Mr. Talbot sent a letter to the Defendant advising him that water had invaded the subsoil underneath his driveway and was beginning to percolate through his asphalt driveway. The

Defendant responded to this letter and advised Mr. Talbot that the Commission was keeping his rates so low that he could not afford to make any repairs to the water system. Mr. Talbot then notified the Commission of the company's service problems. As a result, the Staff advised the Defendant that he had until September 15, 1999, to make the necessary repairs to the system. On September 13, 1999, Mr. Talbot noticed a water delivery company pumping 24,000 gallons of water into the system's storage tank. Mr. Talbot inquired as to the price of the water and was told it was four cents per gallon. Mr. Talbot found it hard to believe the Defendant did not have the money to repair the water leak, but he had $960.00 to pay for water to be delivered. When the Staff imposed deadline passed, Mr. Talbot advised the Staff that he and several of the homeowners were going to effect the repair. On the morning of September 17, 1999, Mr. Talbot notified the Defendant that he and his neighbors were going to repair the leak. They spent about six hours making the repair. Mr. Talbot testified they used a great deal of caution in excavating the leaking pipe and repairing the pipe itself. After they made the repair, they left the excavation open because they wanted to check the next day that the clamps were holding and there were no other leaks. At 7:00 p.m. that evening, the Defendant arrived and began filling in the trench despite the protests of the homeowners that it should remain open to check for leaks and that proper fill material should be put back around the repaired pipe. Mr. Talbot testified the Defendant allowed between 160,000 and 322,000 gallons of water to be wasted during a drought summer when stringent water usage was required throughout the area. Mr. Talbot urged the Commission to impose penalties on the Defendant. (Tr. at 142-52; Ex. DT-10).

The final public witness was Mr. William Morris. His testimony also covered the repairs that were made to the distribution line. Mr. Morris is a retired gas company employee and he is familiar with safe excavation procedures. He assisted Mr. Talbot in making the repair. After excavating the pipe, Mr. Morris found two holes that were about a quarter inch in diameter and a one-inch split along the bottom side of the pipe. The holes were apparently caused by a piece of steel slag that had been resting against the pipe. Mr. Morris wanted to inspect the repairs and another pipe fitting the next day, so the excavation was left open after they completed the repair. The excavation was marked with fluorescent tape and buckets, and was barricaded from the road with automobiles. When the Defendant arrived that evening, he said the excavation represented a safety hazard and began filling in the trench. Mr. Morris wanted to follow the code requirements when filling in a trench, which calls for placing proper fill, free of debris, stones or any foreign material at least six inches around the pipe. Mr. Winney ignored the homeowners' protests and filled in the trench, even putting the stone that caused the leak back into the trench. Mr. Morris testified that he offered on several occasions to assist with emergencies at the water system, but the Defendant has declined his offers. (Tr. at 155-60).

The Defendant called no witnesses, nor did he testify in his own behalf. (Tr. at 161, 166-67).

DISCUSSION

The allegations set forth in the Rule to Show Cause can be conveniently grouped into two categories: (1) those relating to quality of service or facilities; and (2) those relating to compliance with Commission orders. The quality of service problems experienced by this water company go

back as far as 1991, when the Defendant purchased the Smith Mountain Water Company from its original owner. Thereafter, the company was plagued with quality of service and financial difficulties. After five years of Defendant's ownership, the company was in Chapter 7 bankruptcy liquidation. The Waterworks Company of Franklin County is comprised of several well lots and easements purchased by the Defendant out of the bankruptcy liquidation proceeding.[8]

In response to the quality of service allegations, the Defendant claims his service problems are directly related to the Commission's continued denial of any rate relief for the company. This raises an interesting dilemma for the Commission. Should the Commission approve a rate increase for a water company when the operator is mismanaging the company; or phrased another way, should the company's customers be forced to subsidize the incompetence of the operator? The answer is clearly no. The current rates approved by the Commission provide the Defendant with a 23.01% return on rate base, or a net income after expenses of $6,041.00.[9] What the Defendant does with the money he collects from his customers is a mystery. Since he claims he is no longer the owner of the water system, one wonders how the Defendant even has the authority to act on behalf of the company. The Defendant's continued claims of poverty should be taken as nothing more than a smokescreen to hide his gross mismanagement of this water system, which has resulted in inferior water service to his customers.

In response to the allegations concerning failure to comply with Commission orders, the Defendant claims he appealed the Commission's Final Order in Case No. PUE980811 and was, therefore, justified in charging his customers $80.50 per quarter for water service. The Defendant did not offer a defense to the allegation he violated the Commission's Dismissal Order in Case No. PUE990613.

This report will address the allegations in the order they appeared in the Rule to Show Cause.

First Allegation

The Staff alleged the Defendant violated § 56-265.13:4 of the Code of Virginia by failing to provide reasonably adequate facilities. The Defendant failed to repair a leaking distribution line for approximately six weeks and this leak compromised the reliability of the system. This statute provides that: "A small water or sewer utility shall be required to furnish reasonably adequate services and facilities, subject to the regulation of the Commission."[10]

The record in this proceeding established that the leak in the company's distribution line was discovered during the fourth week of July 1999, and was not repaired until September 17, 1999, a period of almost eight weeks. The Defendant was notified when the leak occurred and was notified in correspondence from the affected homeowners and the Staff of the continued leak in the

[8] *See, Application of Robert A. Winney, d/b/a The Water Works Company of Franklin County*, Case No. PUE970119, Report of Michael D. Thomas, Hearing Examiner (January 20, 1998)
[9] *See*, Id.
[10] The Virginia Supreme Court has defined the word "reasonable" as "fair; just; ordinary or usual; not immoderate or excessive; not capricious or arbitrary." *Sydnor Pump and Well Co. v. Taylor*, 201 Va. 311, 317, 110 S.E.2d 525, 530 (1959).

distribution line. The line was leaking at a rate of four gallons per minute, 5700 gallons per day, or over 300,000 gallons for the eight-week period it was leaking. The leak doubled the demand on the system and jeopardized the system's ability to deliver water to 56 customers. There were several times during this period when water service was interrupted and when the water level in the subdivision's water tank was low. The area was in a drought and strict water usage restrictions were in place. It took several homeowners six hours of labor and approximately $15.00 in parts to repair the distribution line. The Defendant claimed he did not have the money to pay someone to repair the leak, although he did have $960.00 to have 24,000 gallons of water hauled to the subdivision's storage tank. The leak in the distribution line had not been repaired when this water was delivered.

I find the Defendant violated § 56-265.13:4 of the Code of Virginia by failing to furnish reasonably adequate facilities, and I recommend the Commission impose a penalty of $1,000.00 against the Defendant, pursuant to § 56-265.6 of the Code of Virginia. The Defendant knew the distribution line had a leak and the severity of the leak. His failure to act jeopardized water service to 56 customers. He had the capability of inspecting and repairing the leak, but apparently chose to do nothing. If money were an issue, he could have repaired the leak himself with a minimal expenditure of time and money. It took the homeowners only six hours of labor and $15.00 in parts to make the repair. The Defendant is compensated for the time he spends working for the company. He should not be permitted to use lack of funds as an excuse for not repairing the leak. The Defendant had $960.00 to pay for a water delivery. This money could have been better spent first repairing the leaking distribution line. At least the money would not have been wasted. At the rate the system was leaking, the 24,000 gallons of water delivered on September 13, 1999, was lost within three days. The Defendant's actions in response to the leaking distribution line were unreasonable and resulted in his failure to provide adequate facilities.

Second Allegation

The Staff alleged the Defendant violated § 56-265.13:4 of the Code of Virginia by failing to provide reasonably adequate service. Under normal circumstances, a water outage would not result in a finding that a water company failed to provide adequate service, unless the outage lasted for several days. However, as respects the Defendant, the series of water outages that occurred from September 5-13, 1999, were indicative of a much larger problem with this water system. The water outages demonstrate the Defendant's neglect of the needs of his customers and the operation of the water system.

The record in this proceeding established that the Defendant ignored customer requests for service, such as flushing the sediment out of the system's lines. He failed to investigate customer reports of leaks. He failed to respond promptly to low water in the system's storage tank and water outages. He failed to promptly repair leaks in the system. He failed to have any procedures in place for water emergencies. He failed to conduct water sampling as required by the VDH. Finally, he failed to take any action to eliminate the presence of bacteria in his water system.

I find the Defendant violated § 56-265.13:4 of the Code of Virginia by failing to furnish reasonably adequate service, and I recommend the Commission impose a penalty of $1,000.00 against the Defendant, pursuant to § 56-265.6 of the Code of Virginia. Simply stated, the record

supports a finding that the customers of this water company have, for some time, been receiving inferior service from the Defendant. The Defendant's customers should not have to worry from day to day whether the water they are using is safe, whether they will have water when they turn on a faucet, or whether the Defendant will respond to water emergencies.

Third Allegation

The Staff alleged the Defendant violated § 56-265.13:4 of the Code of Virginia by failing to furnish reasonably adequate service. The Defendant notified the Staff on September 10, 1999, that he did not have the funds to pay the water company's electric bills and that service was going to be terminated on or about September 14, 1999. The Defendant provided copies of his electric bills to the Staff and requested that they be forwarded to Staff counsel for payment. The Staff alleges the Defendant jeopardized service by failing to provide for payment of his electric bills.

The record in this proceeding established that Defendant received termination notices from AEP that service to his water systems would be terminated after September 14, 1999, for the nonpayment of two electric bills totaling $274.32. At the Staff's request, AEP agreed to postpone the termination while the Staff worked with the Defendant to resolve the problem. The Staff did not know how long AEP would continue to provide service under this arrangement, and it did not know how the bills would ultimately be paid. The record is silent when the Defendant ultimately paid the past due electric bills.

I find the Defendant violated § 56-265.13:4 of the Code of Virginia by failing to furnish reasonably adequate service, and I recommend that the Commission impose a penalty of $1,000.00 against the Defendant, pursuant to § 56-265.6 of the Code of Virginia. But for the timely intervention of the Staff, Defendant's customers would have been without water service after September 14, 1999. The Defendant made no effort to contact AEP to stop the termination from taking effect. He certainly could have attempted to negotiate a payment plan with AEP to pay off the modest amount of money owed the company. The Defendant claimed he had only $20.00 in the company's checking account. If so, he should have sent AEP the money to forestall the termination. He did nothing, except try to push the problem off on the Staff.

Fourth Allegation

The Staff alleged the Defendant violated § 56-265.13:6 of the Code of Virginia by charging a rate higher than the one authorized by the Commission, and by refusing to make refunds as directed by the Commission in its Final Order in Case No. PUE980811.

The record indicates that the Defendant filed an application for a rate increase on November 16, 1998, that was assigned Case No. PUE980811. The Defendant requested a rate increase from $67.50 to $80.50 per quarter for unmetered water service to be effective January 1, 1999. The Commission permitted the higher rate to be placed into effect on January 1, 1999, on an interim basis, subject to refund. On April 15, 1999, the Commission denied the requested rate increase and directed the Defendant to refund the overcharges collected during the period interim rates were in effect. The Defendant was ordered to make the refunds to his customers in the form of a bill credit. The Commission ordered the Defendant to credit his customers bills $26.00 or $26.76

for the third quarter of 1999. The Defendant did not perfect an appeal of the Commission's Final Order. On or about June 30, 1999, the Defendant sent water bills to his customers in the amount of $80.50 for water service for the third quarter 1999. In the bill, the Defendant stated that he sent an appeal to the Commission and he would continue to charge the $80.50 rate, unless otherwise notified by the Commission. The Staff submitted evidence that the Defendant billed two customers $80.50 for water service for the third quarter of 1999. Also, Mr. Eisaman, one of the public witnesses, testified that, in addition to 1997 and 1998, he was overcharged for water service for 1999, and is owed a refund from the Defendant. In 1999, Mr. Eisaman paid $322.00 for water service when the authorized rate was $270.00. In the aggregate, the Defendant owes Mr. Eisaman a refund of $235.51. The Defendant has made no effort to correct his erroneous third quarter 1999 billing, or refund the monies due his customers.

I find the Defendant failed or refused to obey the Commission's Final Order in Case No. PUE980811 from June 30, 1999, the date the Defendant sent the third quarter bills to his customers, to October 22, 1999, the date the Rule to Show Cause was issued in this proceeding. I recommend the Commission penalize the Defendant, pursuant to § 12.1-33 of the Code of Virginia, the sum of $100.00 for each day the Defendant failed or refused to obey the Commission's Final Order.[11] For the period in question, this would amount to a total penalty of $11,400.00. The Defendant knew or should have known at the time he sent the third quarter bills to his customers that he failed to perfect his appeal of the Commission's Final Order. Pursuant to Rule 8:9 of the Commission's Rules of Practice and Procedure, Commission final orders are subject to being modified or vacated by the Commission for a period of 21 days after the order is entered. The filing of a petition for rehearing or reconsideration will not suspend the execution of the order, unless the Commission issues an order within the 21-day period granting the petition and suspending the execution of its final order. In this case, the Commission had until May 6, 1999, to issue such an order, and none was issued. After that date, the Commission's April 15, 1999, order was final and the Commission's prescribed rate of $41.50 or $40.74 for the third quarter of 1999 could no longer be modified by the Commission. The Defendant had until May 17, 1999, to file a notice of appeal with the Clerk of the Commission, and request a stay of the Commission's Final Order from the Supreme Court of Virginia. The Clerk received no such notice, nor was a stay issued by the Supreme Court of Virginia. The Defendant had ample opportunity to confirm the existence of such an appeal and stay prior to issuing the bills. Finally, the Staff repeatedly advised the Defendant that he could not charge the $80.50 rate for the third quarter of 1999. The Defendant's issuance of water bills in the amount of $80.50 for the third quarter of 1999 willfully violated the Commission's Final Order, and denied his customers the Commission ordered refund.

Fifth Allegation

The Staff alleged the Defendant violated § 56-265.13:5 of the Code of Virginia and Rules 4 and 5 of the Commission's Rules Implementing the Small Water or Sewer Public Utility Act by failing to provide his customers notice of a proposed increase in water rates from $67.50 to $80.50 for the third quarter of 1999.

[11] The maximum penalty provided for in § 12.1-33 of the Code of Virginia is $1,000.00 per day for each day a person fails or refuses to obey a Commission order. Considering the Defendant's limited financial resources, I find that a penalty of $100.00 per day is appropriate to ensure Defendant's future compliance with Commission orders.

The statute provides, in part, that:

> [u]nless a small water or sewer utility notifies in writing all of its customers of any changes in its rates, charges, fees, rules and regulations at least forty-five days in advance of any change in any one of them, the utility shall not make any such changes. (§ 56-265.13:5 B of the Code of Virginia).

The record indicates the Defendant notified his customers of the $80.50 water rate for the third quarter 1999 in a bill sent to his customers on or about June 30, 1999. The bill was payable by July 10, 1999.

I find the Defendant violated § 56-265.13:5 of the Code of Virginia and Rules 4 and 5 of the Commission's Rules Implementing the Small Water or Sewer Public Utility Act. The Defendant failed to provide his customers with the required forty-five day notice of a rate increase before implementing such increase. Therefore, I recommend the Commission impose a penalty of $1,000.00 against the Defendant, pursuant to § 56-265.6 of the Code of Virginia.

Sixth Allegation

The Staff alleged the Defendant violated § 56-265.13:6 of the Code of Virginia by failing to make certain refunds as directed by the Commission in its Dismissal Order in Case No. PUE990613.

The record indicates that the Defendant filed another application for a rate increase on August 20, 1999, and this case was assigned Case No. PUE990613. In this application, the Defendant requested authority to increase his rates from $67.50 to $80.50 for the fourth quarter of 1999. It appeared to the Staff that the Defendant filed this rate increase only to justify his continued charging of a $80.50 quarterly water rate. The Staff was aware the Defendant continued to charge the $80.50 water rate for the third quarter of 1999 despite repeated warnings from the Staff that he was not authorized to charge that rate. The Staff introduced into evidence one complaint where a customer was billed, and paid Defendant, the $80.50 rate for water service for the fourth quarter of 1999. On September 27, 1999, the Commission issued a Dismissal Order in Case No. PUE990613. The Commission found the Defendant's application violated § 56-265.13:6 B of the Code of Virginia which prohibits more than one rate increase in any twelve-month period. The Commission ordered the Defendant to refund, on or before October 15, 1999, the difference between the authorized rate of $67.50 and the proposed rate of $80.50 to any customer that paid the proposed rate. In the one complaint in evidence, the customer had not received his refund as of October 20, 1999. It further appeared from the record that the Defendant continued to bill the $80.50 water rate for the first quarter of 2000.

I find the Defendant failed or refused to obey the Commission's Dismissal Order in Case No. PUE990613 from October 15, 1999, the date by which Defendant was ordered to make refunds to his customers, to January 11, 2000, the date of the hearing in this case. I recommend the Commission penalize the Defendant, pursuant to § 12.1-33 of the Code of Virginia, the sum of $100.00 for each day the Defendant failed or refused to obey the Commission's Dismissal Order. For the period in question, this would amount to a total penalty of $8,900.00. The Defendant

offered no defense to this allegation. Unfortunately, it appears from the record that whenever the Defendant receives an unfavorable ruling from the Commission, he simply chooses to ignore the Commission's order.

In addition to the recommendations set forth above, I further recommend the Commission proceed with an action pursuant to § 56-265.13:6.1 of the Code of Virginia to appoint a receiver to operate this water company. The statute provides, in part, that:

> [t]he Commission may, either upon petition of two-thirds of the affected customers or upon petition of its staff or upon a petition of the Board of Health, appoint a receiver to operate a small water or sewer utility which is unable or unwilling to provide adequate service to its customers. The utility shall be deemed to be unable or unwilling to provide adequate service if the Commission finds, after notice to the utility and the Department of Health and hearing, that:
>
> 1. The utility has failed to supply water or sewer service to a majority of the consumers for five days or more during the preceding three months for reasons within the control of the water and sewer utility; or
> 2. The Department of Health has certified that the utility has not met Department standards regarding the provision of an adequate quality and quantity of public drinking water and the Department of Health has found that the utility is unwilling to take action to meet these standards; or
> 3. <u>The utility is grossly mismanaged</u>; or
> 4. The utility has failed to comply with an order of the Commission to provide adequate service to the customers. (Emphasis added).

A finding of any one of the four requirements set forth above would be sufficient for the Commission to appoint a receiver. The record in this proceeding would support a finding that the company is grossly mismanaged. At present, no one knows who really owns the company or who is responsible for the day-to-day operation of the company, no one knows why the utility does not have sufficient funds to pay its bills as they come due in the ordinary course of business, no one knows whether the company is continuing to overcharge customers for water service, and no one knows whether the company refunded overpayments as directed by the Commission. The only way these questions can be answered is for a receiver to be appointed who could: (1) marshal the company's assets; (2) establish standards and procedures for the provision of water service, including procedures for water testing and water emergencies; (3) manage the day-to-day affairs of the company; (4) conduct a complete audit of the company's books and records; (5) make refunds of overpayments, as required; and (6) determine whether the interests of the company's customers would best be served by the sale of the company to a responsible operator.

FINDINGS AND RECOMMENDATIONS

Based on the evidence received in this case, and for the reasons set forth above, I find that:

(1) Defendant violated § 56-265.13:4 of the Code of Virginia on three (3) separate occasions;

(2) Defendant failed or refused to obey the Commission's Final Order in Case No. PUE980811;

(3) Defendant violated § 56-265.13:5 of the Code of Virginia on one (1) occasion; and

(4) Defendant failed or refused to obey the Commission's Dismissal Order in Case No. PUE990613.

I therefore ***RECOMMEND*** that:

(1) The Commission enter a Judgment Order penalizing the Defendant the sum of $3,000.00 for Defendant's three (3) violations of § 56-265.13:4 of the Code of Virginia;

(2) The Commission enter a Judgment Order penalizing the Defendant the sum of $11,400.00 for Defendant's failure or refusal to obey the Commission's Final Order in Case No. PUE980811;

(3) The Commission enter a Judgment Order penalizing the Defendant the sum of $1,000.00 for Defendant's one (1) violation of § 56-265.13:5 of the Code of Virginia;

(4) The Commission enter a Judgment Order penalizing the Defendant the sum of $8,900.00 for Defendant's failure or refusal to obey the Commission's Dismissal Order in Case No. PUE990613; and

(5) The Commission proceed with an action to have a receiver appointed for The Waterworks Company of Franklin County.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of

such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

_____

Michael D. Thomas
Hearing Examiner